

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 30, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 99-0344

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CITY OF NEENAH,

PLAINTIFF-RESPONDENT,

V.

MICHAEL A. BELLIN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: WILLIAM H. CARVER, Judge. *Affirmed.*

NETTESHEIM, J. Michael A. Bellin appeals from a judgment of conviction for operating while intoxicated (OWI) contrary to § 346.63(1)(a), STATS. He raises two arguments on appeal challenging the sufficiency of evidence to support his conviction. Bellin first argues that the City of Neenah failed to provide a foundation for the field sobriety testing. Second, he contends that the intoxilyzer test results cannot be used to support his conviction because

the City failed to introduce evidence that the intoxilyzer used to record his BAC was certified for accuracy. We reject Bellin's arguments and affirm the judgment.

On August 21, 1998, Officer Dennis Gitter of the City of Neenah Police Department cited Bellin for OWI and operating with a prohibited alcohol concentration (PAC). At a combined motion and trial hearing on November 4, 1998, Gitter was the only witness. Gitter testified that on August 21 at approximately 1:05 a.m., he observed Bellin's vehicle operating in an "erratic fashion." When asked to describe Bellin's driving, Gitter testified: "[I]t was like [the vehicle] was weaving in between cones ... at first I thought he was avoiding the manhole covers because it was so severe, and then [the vehicle] crossed over the centerline a couple times, too."

Gitter followed Bellin's vehicle for a couple of blocks before activating his emergency lights. Gitter approached and began talking to him. Gitter noticed Bellin's slurred speech pattern, red eyes and a heavy odor of intoxicants emanating from the vehicle. When asked to produce a driver's license, Bellin fumbled with his wallet for approximately one minute. Bellin admitted that he had been drinking.

Gitter requested a back-up officer and began field sobriety testing in a nearby parking lot. He had Bellin perform the walk-and-turn test and the one-leg-stand test. In Gitter's opinion, Bellin failed each test. Gitter transported Bellin to the police department and issued him an OWI citation. The results of the

intoxilyzer test given at the station showed a prohibited alcohol concentration. Gitter then issued Bellin a PAC citation.¹

At the hearing, Bellin's counsel first objected to the admission of the intoxilyzer results because the intoxilyzer operator was not present to testify as to the certification and accuracy of the machine. Although the court offered to reconvene the hearing at a later date, counsel withdrew his objection. The court accepted the test results as evidence in support of the PAC charge. The court found Bellin guilty of OWI and PAC. It dismissed the PAC charge and entered judgment on the OWI charge. Bellin appeals.

Section 346.63(1)(a), STATS., prohibits driving “[u]nder the influence of an intoxicant ... to a degree which renders [one] incapable of safely driving.” To sustain its burden of proof, the prosecution is required to establish that (1) the person charged was operating a vehicle on the highway and (2) he or she was under the influence of intoxicants. *See Monroe County v. Kruse*, 76 Wis.2d 126, 131, 250 N.W.2d 375, 377 (1977). The City must prove each element of the charges against the defendant by clear, satisfactory and convincing evidence. *See id.* at 130, 250 N.W.2d at 377. We will uphold the trial court's finding unless it is against the great weight and clear preponderance of the evidence. *See id.* at 132, 250 N.W.2d at 378.

Bellin first argues on appeal that the City did not provide a proper foundation for the reliability of the field sobriety tests. Specifically, Bellin contends that his inability to perform the tests does not necessarily indicate an

¹ We note that the PAC citation is not included in the appellate record. However, it is evident from the hearing transcript that a PAC citation was issued.

impaired ability to operate a motor vehicle. In support of his argument, Bellin cites to several editorial comments made by the judge regarding the difficulty of the tests and his skepticism as to whether the tests are a reliable indicator of intoxication. However, while acknowledging the difficulty of the tests, the court nevertheless found that the tests administered in this case sufficiently demonstrated that Bellin's sense of balance was impaired.

Gitter's testimony regarding Bellin's performance on the tests is consistent with the court's finding. Gitter testified that during the heel-to-toe test, Bellin had to extend his arms out to the side in order to balance and stepped off the line. When performing the one-leg-stand test, Bellin had to touch down several times and was unable to count to thirty. Based on Gitter's testimony, we conclude that a trier of fact could reasonably infer—without expert testimony—that Bellin's ability to operate a motor vehicle was impaired.

In addition to the evidence of impairment when performing the field sobriety tests, Gitter testified generally as to his observations of Bellin's impaired operating ability. Gitter testified that Bellin was "severely weaving" back and forth such that Gitter believed Bellin was attempting to avoid something in the road. Gitter testified that Bellin smelled of intoxicants, slurred his speech, had red eyes and admitted to drinking. Finally, Gitter testified that Bellin fumbled with his wallet for approximately one minute before producing his driver's license.

In reviewing this evidence, we conclude that the City proved by clear and convincing evidence that Bellin was operating a motor vehicle and that his ability to do so was impaired. While Bellin additionally argues that the OWI conviction must be reversed based on the City's failure to provide foundation evidence of the intoxilyzer's certification and accuracy, we need not resolve this

issue. Although Bellin was found guilty of both OWI and PAC, he was convicted only of OWI. We conclude that there is sufficient evidence absent the intoxilyzer results to support Bellin's OWI conviction. We affirm the judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

